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In the Matter of)	
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Petition of Qwest Corporation for a Declaratory)	WC Docket No. 02-77
Ruling Regarding the Applicability of Section)	
251(c)(4) Discounted Resale Requirements to)	
Certain Bulk DSL Services Provided by Qwest)	
To Microsoft Network, L.L.C.)	
)	

The Association of Communications Enterprises (“ASCENT”),¹ through undersigned counsel and pursuant to *Public Notice* DA 02-879 (released April 15, 2002), hereby opposes the Petition for Declaratory Ruling filed by Qwest Corporation (“Qwest”) in the above-referenced proceeding on April 3, 2002 (the “Petition”). In its Petition, Qwest asks the Commission to issue a declaratory ruling that *any* xDSL-based services “an incumbent local exchange carrier (“LEC”) sells to an unaffiliated Internet service provider (“ISP”) as inputs for the ISPs’ own retail offerings are provided on a wholesale basis, not at ‘retail,’ and that those services thus fall outside the scope of the ‘retail minus avoided cost’ resale pricing obligations under 47 U.S.C. § 251(c)(4),” including services in conjunction with which the incumbent LEC performs “certain sales, marketing,

¹ ASCENT is a national trade association representing smaller providers of competitive telecommunications and information services. The largest association of competitive carriers in the United States, ASCENT was created, and carries a continuing mandate, to foster and promote the competitive provision of telecommunications and information services, to support the competitive communications industry, and to protect and further the interests of entities engaged in the competitive provision of telecommunications and information services.

billing, and collection services” for the unaffiliated ISP.² ASCENT submits that Qwest, in so contending, misreads and misapplies pertinent Commission determinations, in particular those contained in the Second Report and Order in CC Docket No. 98-147.³

Qwest offers two defenses for its claim that an incumbent LEC need not offer for Section 251(c)(4) discounted resale bulk DSL service offerings sold to ISPs even though the incumbent LEC performs certain marketing, billing and collection functions in conjunction with those service offerings. First, Qwest asserts that the Commission has exempted from Section 251(c)(4) discounted resale requirements any and all DSL service offerings sold to one or more ISPs as an input component to the ISPs’ retail Internet access service, regardless of the “retail functionalities” included with the DSL service offerings,⁴ deeming all such service offerings not to

² Petition at 1, 5 - 6 (*emphasis added*).

³ In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Services (Second Report and Order), 14 FCC Rcd. 19237 (1999) (*subsequent history omitted*).

⁴ By its own admission, Qwest, for example, provides Microsoft Network, L.L.C. (“MSN”) in conjunction with its bulk DSL service offering “certain sales, marketing, billing, and collection services,” periodically “interacts with end users on MSN’s behalf in order to resolve service-related problems on end users’ premises,” and “may make billing statement adjustments in certain circumstances.” Petition at 5 - 6.

be offered “at retail.”⁵ Alternatively, Qwest argues that even if a DSL service offering sold to one or more ISPs was deemed to be offered “at retail,” the Section 251(c)(4) discounted resale requirements would nonetheless not apply because “the only service . . . [an] end user[would] purchase is a bundled high-speed service that combines DSL with Internet access.”⁶

⁵ Petition at 8 - 11.

⁶ Id. at ii, 12 - 14.

With respect to Qwest's first contention, the carrier misreads the Commission's *Second Report and Order* in CC Docket No. 98-147. In the *Second Report and Order*, the Commission undertook a "fact-specific evaluation" of certain bulk DSL service offerings sold to ISPs for inclusion in high-speed Internet access service offerings, and ultimately concluded, "based on the record before . . . [it]," that these bulk offerings were "inherently different from advanced services made available directly to business and residential end-users."⁷ As identified by the Commission, the principal "difference" was that "the DSL services that incumbents are offering to Internet Service Providers specifically contemplate that the Internet Service Provider will be the entity providing to the ultimate end-user many services typically associated with retail sales, including, among others, providing customer service, and marketing, billing, ordering, and repair."⁸ According to the Commission, the mandatory provision of "these typical retail services to the ultimate consumer" by "[a]ny Internet Service Provider that purchases a bulk DSL service" serves to "underscore that bulk DSL services sold to Internet Service Providers are markedly different from

⁷ In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Services (Second Report and Order), 14 FCC Rcd. 19237 at ¶¶ 3, 8, 19.

⁸ Id. at ¶¶ 7 - 8, 15, 17.

the retail DSL services designed for individual end-user consumption.”⁹ As the Commission

⁹ Id. at ¶ 15. Elaborating on this point, the Commission explained that it was reasonable to conclude that bulk DSL service offerings which required ISPs to “take on the consumer-oriented tasks of marketing, billing, and collections to the ultimate consumer and accepting repair requests directly from the end-user,” thereby ensuring that “incumbents would not avoid any appreciable level of retail costs associated with providing these typical retail functions,” did “not fit within the type of transaction Congress intended to include under the discounted resale obligation in section 251(c)(4).” Id. at ¶ 17.

conceded, bulk offerings which include retail functions performed by the incumbent LEC, such as Customer Specific Arrangements (“CSAs”) are “telecommunications services [provided] at retail.”¹⁰

Acceptance of Qwest’s interpretation would wall off from statutory discounted resale opportunities any DSL service provided by an incumbent LEC to an ISP, even if that service offering were identical in all respects with DSL service offerings made available to other businesses. In short, Qwest’s view would essentially create an exemption for bulk offerings. And as noted above, the Commission has already, and repeatedly, declared such a broad exemption unlawful in the context of CSAs. “By foreclosing resale of CSAs,” the Commission explained, an incumbent LEC could “prevent resellers from competing for large-volume customers, thus hindering local exchange competition.”¹¹ Likewise, by foreclosing resale of bulk DSL offerings which incorporate

¹⁰ Id. at ¶ 16, fn. 35. Application of BellSouth Corporation, et al .Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in South Carolina (Memorandum Opinion and Order), 13 FCC Rcd. 539, ¶¶ 215 - 24 (1997) (*subsequent history omitted*); Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499, ¶ 948 (1996) (*subsequent history omitted*) (“The statute makes no exception for promotional or discounted offerings, including contract and other customer specific offerings . . . A contrary result would permit incumbent LECs to avoid the statutory resale obligation by shifting their customers to nonstandard offerings, thereby eviscerating the resale provisions of the 1996 Act.”).

¹¹ Application of BellSouth Corporation, et al .Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in South Carolina (Memorandum Opinion and Order), 13 FCC Rcd. 539 at ¶ 224.

multiple retail functions incumbent LECs would prevent resellers from competing for ISPs.

Qwest complains that not accepting its reading of the *Second Report and Order* would “compromise any incumbent LEC incentive to provide low-cost DSL transmission services to ISPs.”¹² This is obviously not the case. While ASCENT disagrees with the Commission’s holding in the *Second Report and Order*, and indeed, has urged the Commission to revisit it in light of exploitation by incumbent LECs of the holdings therein in ways not anticipated by the Commission,¹³ the decision provides incumbent LECs with a clear “road map” as to how to structure their bulk DSL offerings to avoid Section 251(c)(4) discounted resale requirements when provided to ISPs. If Qwest were to provide bulk DSL service offerings to ISPs pursuant to which ISPs would be required to “take on the consumer-oriented tasks of marketing, billing, and collections to the ultimate consumer and accepting repair requests directly from the end-user,” it would be insulated from Section 251(c)(4) discounted resale obligations.¹⁴

¹² Petition at 1.

¹³ Comments of the Association of Communications Enterprises, filed in CC Docket No. 02-33 on May 2, 2002, at pp. 10 - 14.

¹⁴ Petition at 1. Qwest emphasizes the Commission’s determination that exempting certain bulk DSL service offerings from Section 251(c)(4) discounted resale should “encourage incumbents to offer

advanced services to Internet Service Providers at the lowest possible price,” resulting in ultimate consumer benefit.” Id. at 9. Qwest neglects to mention that the Commission limited the “carve out” so as to “ensur[e] that resellers are able to acquire advanced services at wholesale rates,” thereby “ensuring that competitive carriers are able to enter the advanced services market by providing to consumers the same quality service offerings provided by incumbent LECs.” In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Services (Second Report and Order), 14 FCC Rcd. 19237 at ¶¶ 3 19.

Qwest also complains that any reading of the *Second Report and Order* other than the one it proposes would necessitate “fact-intensive” inquiries.¹⁵ As the Commission recognized in the *Second Report and Order*, its holding was predicated on the “fact-specific evaluation” before it, suggesting that a different factual record might have compelled a different result.¹⁶ Accordingly, application of the standards articulated in the *Second Report and Order* to different factual circumstances would necessarily require a “fact-intensive” inquiry. Again, however, the Commission – wrongfully in ASCENT’s view – has provided Qwest with a “safe-harbor.” If Qwest desires to avoid Section 251(c)(4) discounted resale of its bulk DSL service offerings provided to ISPs without actual inquiry, it need only stay within that safe-harbor. Factual inquiries are required only when an incumbent LEC ventures outside the safe-harbor, as Qwest has done here.¹⁷

¹⁵ Petition at 3 - 4, 8.

¹⁶ In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Services (Second Report and Order), 14 FCC Rcd. 19237 at ¶¶ 8, 19.

¹⁷ Qwest further complains that it is being treated unfairly because its “investment-backed expectations” would be “defeated” if its reading of the Second Report and Order did not prevail. Once again, the only “expectations” that an incumbent LEC is entitled to under the Second Report and Order is that it will not be required to offer for Section 251(c)(4) discounted resale bulk DSL service offerings provided to ISPs so long as the ISPs were required to “take on the consumer-oriented tasks of marketing, billing, and collections to the ultimate consumer and accepting repair requests directly from the end-user.”

Qwest's "back-up" arguments can be dispensed with summarily. Qwest's simply misses the point in asserting that even if a DSL service offering sold to one or more ISPs was deemed to be offered "at retail," the Section 251(c)(4) discounted resale requirements would nonetheless not apply because "the only service . . . [an] end user[would] purchase is a bundled high-speed service that combines DSL with Internet access."¹⁸ It is the ISP, not Qwest that is providing a "bundled service." Qwest is providing only DSL transmission. Hence, to the extent that that DSL transmission service does not fall within the exemption carved out by the Commission, it is subject to Section 251(c)(4) discounted resale requirements.

¹⁸

Petition at ii.

Qwest's last salvo challenges the right of a State Commission to determine "the applicability of a *federal* statute (section 251(c)(4)) to *interstate* service offerings covered by a *federal* tariff."¹⁹ Initially, it is a surprising argument to hear from an incumbent LEC given that incumbent LECs have been the most vocal opponents of national rules applicable to services provided at the local level.²⁰ Moreover, in light of various holding of the U.S. Court of Appeals for the District of Columbia Circuit, it is not at all clear that DSL service provided to ISPs is an interstate service offering covered by a federal tariff.²¹ The Commission having announced that its determinations regarding the applicability of Section 251(c)(4) discounted resale obligations to bulk DSL service offerings provided to ISPs were highly fact specific, ASCENT submits that the Commission should welcome a detailed analysis of incumbent LEC generated permutations of such offerings by individual state commissions. ASCENT submits that the Minnesota Department of

¹⁹ Id. at 8.

²⁰ See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499 at ¶¶ 50 - 51.

²¹ See WorldCom, Inc. v. Federal Communications Commission, Case No. 01-1218, slip op. (D.C. Cir. 2002); Bell Atlantic Telephone Cos. v. Federal Communications Commission, 206 F.3d 1 (D.C.Cir. 2000).

Commerce, maligned by Qwest as “purport[ing] to ‘represent consumer interests’ before the state public utilities commission,” is to be commended, not taken to task, for its efforts to ensure that statutory mandates are fully applied.²²

²² Indeed, the Commission has looked to the States in any number of instances to assist it in ensuring full compliance with the mandates of the Telecommunications Act of 1996. *See, e.g., Implementation of the Subscriber Carrier Selection Change Provisions of the Telecommunications Act of 1996* (First Order on Reconsideration), 15 FCC Rcd. 8158, ¶¶ 23 - 30 (2000).

By reason of the forgoing, the Association of Communications Enterprises urges the Commission to deny Qwest the relief the carrier seeks here.

Respectfully submitted,

**ASSOCIATION OF COMMUNICATIONS
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